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1985]

CONSTITUTIONAL LAW—FIRST AMENDMENT—PUBLIC HAS RIGHT OF ACCESS TO CIVIL PROCEEDINGS

Publicker Industries, Inc. v. Cohen (1984)

Historically, under the common law, the public has enjoyed a right of access to the judicial process.¹ Whether the Constitution protects public access to judicial proceedings has been less clear.² Although the Constitution guarantees the criminally accused a right to a public trial, it does not expressly guarantee the public a right of access to criminal trials.³ Despite the absence of an express constitutional public right of access, however, in 1980 the Supreme Court decided that even at the unopposed request of a criminal defendant, a criminal trial may not be closed to the public unless the trial court articulates an overriding interest to justify the closure.⁴ The Court's decision was based on its finding

1. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 564-73, 580 n.17 (1980) (plurality opinion); *Gannett Co. v. DePasquale*, 443 U.S. 368, 418-33 (1979) (Blackmun, J., concurring in part and dissenting in part).

Open criminal and civil trials are longstanding features of the English judicial system. E. JENKS, *THE BOOK OF ENGLISH LAW* 91 (1st ed. 1929). As early as 1267, the Statute of Marlboro required open proceedings "for all Causes ought to be heard, ordered, and determined before the Judges of the King's Courts openly in the King's Courts, whither all persons may resort." *Richmond Newspapers*, 448 U.S. at 565 n.6 (quoting 2 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 103 (6th ed. 1681) (emphasis added by the Court)). Early American colonists brought with them the English presumption of open trials. *Id.* at 567. For example, the "Pennsylvania Frame of Government of 1682 . . . provided '[t]hat all Courts shall be open.'" *Id.* at 568 (quoting *LAWS AGREED UPON IN ENGLAND*, cited in 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 140 (1971) and cited in *SOURCES OF OUR LIBERTIES* 217 (R. Perry ed. 1959)).

2. For a discussion of the Court's decision that the Constitution does protect the public's right of access to criminal trials, see *infra* notes 3-7 and accompanying text.

3. U.S. CONST. amend. VI. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." *Id.* The Supreme Court has held that the right to a public trial is a personal right of the accused which does not guarantee the public a right of access to a pretrial suppression hearing. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 379 (1979). Although the *Gannett* Court addressed the narrow issue of access to a pretrial suppression hearing, the Court spoke in terms of public trials, generally, and made clear that the sixth amendment does not guarantee to the press and public a right of access to criminal trials. See *id.* at 379-80.

4. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980) (plurality opinion). In *Richmond Newspapers*, the defendant moved that his fourth trial for the same murder be closed to the public to prevent the possibility of another mistrial. *Id.* at 559-61. The prosecutor did not object, and the trial judge ordered closure, relying on a state statute giving the court discretionary power to exclude persons whose presence might impair a fair trial. *Id.* at 560. Later in the day, *Richmond Newspapers* unsuccessfully made a motion to vacate the court's closure order. *Id.* at 560-61. The newspaper appealed, but the Virginia

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that the first⁵ and fourteenth⁶ amendments guarantee to the public and press a right of access to criminal trials.⁷ The Supreme Court reaffirmed the public's first amendment right of access to criminal trials in 1982

Supreme Court dismissed the newspaper's mandamus and prohibition petitions and denied its petition for appeal. *Id.* at 562. The Supreme Court, after granting certiorari, held that the first and fourteenth amendments guarantee the public and press a right of access to criminal trials unless there is an overriding interest articulated in the findings. *Id.* at 580-81 (plurality opinion). *See also id.* at 581-82 (White, J., concurring); *id.* at 582-84 (Stevens, J., concurring); *id.* at 584-98 (Brennan, J., concurring in the judgment); *id.* at 598-601 (Stewart, J., concurring in the judgment); *id.* at 601-04 (Blackmun, J., concurring in the judgment); *id.* at 604-06 (Rehnquist, J., dissenting). The Court, however, did not define the circumstances that would constitute such an overriding interest. *Id.* at 581 n.18 (plurality opinion). Because the trial court had made no findings to support closure of the criminal trial, the United States Supreme Court reversed, finding that the Virginia court had impermissibly closed the trial in violation of the public's constitutional rights. *Id.* at 580-81 (plurality opinion); *id.* at 600-01 (Stewart, J., concurring in the judgment).

5. U.S. CONST. amend. I. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The first amendment does not explicitly guarantee to the public a right of access to criminal trials. *See id.* However, the first amendment has been interpreted to imply other freedoms which it does not grant explicitly. *See, e.g.,* *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (first amendment rights to speak and to publish imply a freedom to listen); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (first amendment right to publish implies freedom to gather information).

6. U.S. CONST. amend. XIV. The fourteenth amendment provides in pertinent part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* § 1. The fourteenth amendment has been interpreted to incorporate the first amendment, making the latter applicable to the states. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

7. *Richmond Newspapers*, 448 U.S. at 580 (plurality opinion). In finding constitutional support for the public's right of access to criminal trials, the Supreme Court noted that the Bill of Rights was enacted at a time when trials had long been presumptively open. *Id.* at 575 (plurality opinion). Therefore, the Court reasoned that "[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees." *Id.* (plurality opinion). The Court had already laid the groundwork for this guarantee by distinguishing prior cases involving conflicts between public access and a criminal defendant's right to a fair trial on the basis that those cases were decided under the sixth amendment, which gives rights to the accused, not to the public. *Id.* at 564 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 377-78 (1979); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976); *Murphy v. Florida*, 421 U.S. 794 (1975); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965)). For a further discussion of the Court's reasoning in *Richmond Newspapers*, see *infra* notes 69 & 72 and accompanying text. For an extensive discussion of the *Richmond Newspapers* case and of the first amendment right of access, see O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication*, 26 VILL. L. REV. 1 (1980).

when it found unconstitutional a statute mandating the exclusion of the press and public during the testimony of minor victims of specified sexual offenses.⁸ The Third Circuit extended this first amendment protection in *Publicker Industries, Inc. v. Cohen*.⁹ In *Publicker Industries*, the Third Circuit held that the public has not only a common law¹⁰ but also a constitutional¹¹ right of access to civil proceedings.

The questions presented to the Third Circuit in *Publicker Industries* arose from a proxy fight to determine control of a publicly traded corporation, Publicker Industries (Publicker).¹² Publicker brought this action against a participant in the proxy fight, David Cohen, seeking to enjoin him from soliciting and voting proxies because of his misrepresentation in failing to make material disclosures in connection with his planned

8. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-06 (1982). In *Globe Newspaper* the Court recognized that the right of access to criminal trials was protected by the first amendment but that it was not an absolute right. *Id.* at 606. The Court considered two state interests which were asserted to support the mandatory closure statute: (1) protecting minor victims of sex crimes from further psychological distress, and (2) encouraging such victims to come forward to testify. *Id.* at 607. The Court found the second state interest speculative and illogical, but found the first interest compelling. *Id.* at 607-10. The Court stated, however, that even the compelling first interest did not justify mandatory closure because the same interest could be served if the trial court determined whether closure was necessary on a case-by-case basis. *Id.* at 607-08. Because closure would not always be necessary to protect the victim, the Court found that the mandatory closure statute was not narrowly tailored to protect the state's compelling interest and, consequently, ruled the statute unconstitutional. *Id.* at 609-11 & n.27. For a further discussion of the Court's reasoning in *Globe Newspaper*, see *infra* note 73 and accompanying text.

9. 733 F.2d 1059 (3d Cir. 1984).

10. *Id.* at 1069. For a further discussion of the Third Circuit's finding of a common law right of access to civil proceedings, see *infra* notes 31-33 and accompanying text.

11. 733 F.2d at 1070. The Third Circuit held that the first and fourteenth amendments guarantee the public a right of access to civil judicial proceedings. *Id.* The Court stated that this right is not absolute, however, and that the trial court may limit the public's right of access when an important countervailing interest is demonstrated. *Id.* at 1070-71. For a discussion of the Third Circuit's finding of a constitutional right of access to civil proceedings, see *infra* notes 35-46 and accompanying text.

12. 733 F.2d at 1061-62. Publicker is a corporation with approximately 6,000 shareholders. *Id.* The Neuman family, through individuals and various estates, controlled 37% of the 8.3 million outstanding shares of Publicker stock. *Id.* at 1062. The defendant, David Cohen, sought to gain control of the Publicker board of directors through an agreement with certain members of the Neuman family. *Id.* The agreement provided that the Neumans would give Cohen their proxies to be voted at the annual stockholder's meeting in exchange for Cohen's promise to purchase a substantial number of their shares of Publicker stock if he gained control of the board. *Id.* One member of the Neuman family resisted this plan and successfully brought an action in the Delaware County Court of Common Pleas to have the agreement set aside. *Id.* The court held that the agreement was invalid because it violated a Pennsylvania statute which prohibits a corporate stockholder from selling his voting rights or proxy. *Id.* (citing 15 PA. CONS. STAT. ANN. § 1504 (Purdon 1983)).

purchase of Publicker stock.¹³ Cohen, however, claimed that Publicker should be required to postpone its December 8 shareholders' meeting until it disclosed to its shareholders the fact that one of Publicker's subsidiaries had failed to obtain a required approval for its production of scotch whiskey,¹⁴ which raised the possibility that its scotch was produced illegally and would have to be withdrawn from the market.¹⁵

During the course of a December 7 hearing on motions filed by both parties,¹⁶ a *Philadelphia Inquirer* reporter appeared in the courtroom

13. 733 F.2d at 1062. In its complaint and motion for a temporary restraining order, Publicker contended that Cohen had made misrepresentations and had failed to make material disclosures required in Schedules 13D and 14B, which are required under the Securities Exchange Act of 1934 and rules promulgated under that Act. See 17 C.F.R. § 240.13d-1 (1984) (regulation regarding filing of Schedule 13D); 17 C.F.R. § 240.14a-11 (1984) (regulation regarding filing of Schedule 14B). See also L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 526, 577-78 (1983) (discussing requirements for filing and disclosure regarding schedules 13D and 14B).

Upon being informed of the common pleas court order which invalidated Cohen's stock purchase agreement with the Neuman family, Publicker filed a motion for a temporary restraining order in federal district court to prevent Cohen from soliciting and voting proxies for the December 8 shareholders' meeting until he amended his filings with the SEC. 733 F.2d at 1062. The district court held a conference to consider the motion for a temporary restraining order on December 3, the day it was filed. *Id.* The district court issued the temporary restraining order and ordered another hearing to be held December 6. *Id.*

14. 733 F.2d at 1062, 1065. A question concerning this potentially harmful information was first raised at the December 3 conference on Publicker's motion for a temporary restraining order. *Id.* at 1062. The information in question concerned the fact that one of Publicker's subsidiaries had failed to obtain the required approval from the British government for the introduction of an enzyme into its production of scotch whiskey. *Id.* at 1065. The use of this enzyme is common in the production of scotch whiskey and is permitted under the English Company Finance Act, provided that prior approval is obtained from Customs and Excise. *Id.* Publicker sought to prevent disclosure of its subsidiary's unauthorized use of the enzyme until Customs and Excise determined whether to approve this unauthorized use. *Id.* Cohen claimed that Publicker's failure to disclose this information violated federal securities laws requiring material disclosures by participants in proxy contests. *Id.* at 1062. In denying this allegation, Publicker asserted that disclosure on December 8 would be premature because this information would not be material if Customs and Excise decided to approve the unauthorized use. *Id.* Publicker also claimed that Cohen had violated a confidentiality agreement with Publicker when he sought to use this information to postpone the stockholders' meeting. *Id.*

15. *Id.* at 1065. Since Customs and Excise had not decided whether to approve Publicker's subsidiary's unauthorized use of the enzyme, the legality of the subsidiary's scotch was in question. *Id.* Moreover, Publicker, through its board chairman, claimed that because most scotch whiskeys are blends of scotches produced by many different distilleries, including Publicker's, the legal status of the scotch industry as a whole was in doubt. *Id.*

16. *Id.* at 1062. The court addressed the following issues in considering the parties' motions: (1) whether Cohen should be enjoined from soliciting and voting proxies at the December 8 shareholders' meeting because of his failure to make material disclosures to the SEC, as required by federal statute; and

of District Judge Joseph Lord.¹⁷ Publicker immediately requested that the hearing be closed to everyone except the parties, their counsel, and witnesses because of the sensitive nature of the information that was being discussed.¹⁸ Judge Lord complied with Publicker's request.¹⁹ Later during the hearing, attorneys representing both Philadelphia Newspapers, Inc. (PNI)²⁰ and Dow Jones & Company, Inc. (Dow Jones)²¹ appeared before Judge Lord and unsuccessfully urged him to open the proceedings.²² At the conclusion of the closed hearing, Judge Lord denied Cohen's motion to enjoin the December 8 shareholders' meeting and continued his order for confidentiality until he decided whether the court should compel disclosure of the sensitive information.²³

On December 20, PNI filed a motion in the district court for imme-

(2) whether Publicker should be required to disclose the information about its subsidiary's scotch at the scheduled shareholders' meeting. *Id.* at 1062-63.

17. *Id.* at 1063. The reporter was present in the courtroom when the court reconvened after lunch. *Id.* The Third Circuit found the record unclear as to whether anyone from the general public attended the morning session. *Id.*

18. *Id.* at 1063. The basis of Publicker's request was that the very purpose of the hearing was to decide whether the information concerning Publicker's subsidiary should be disclosed. *Id.* For a discussion of the information in question, see *supra* notes 14-15 and accompanying text.

19. 733 F.2d at 1063. Judge Lord explained:

It seems to me by permitting the press here now, that the press would be usurping the very function that is reposed in me; namely, deciding whether this information should be revealed or not. That is the very issue of this case. . . . Here, if it is disclosed the press would be making the decision before I made mine and it would make mine moot, and I believe in protection of my own judicial functions in this case I have the power to exclude the press and I will.

Id. (citing Joint Appendix at A117).

20. *Id.* at 1063. Philadelphia Newspapers, Inc. (PNI) is the publisher of the *Philadelphia Inquirer*. *Id.*

21. *Id.* Dow Jones & Company, Inc. (Dow Jones) is the publisher of the *Wall Street Journal*. *Id.* Dow Jones' involvement in the controversy began when a reporter for the *Wall Street Journal* appeared in the courtroom after the closure of the hearing. *Id.* Her request for a hearing with counsel for the publishers (PNI and Dow Jones) present in order to ascertain why the hearing was closed was denied. *Id.*

22. *Id.* In the alternative, counsel urged the court to open the nonconfidential parts of the hearings if it would not open the entire proceedings. *Id.* The court rejected this request, stating that the entire hearing had been confidential. *Id.* The court explained to counsel that its closure of the hearing was necessary to protect the court's ability to determine the confidentiality issues before it. *Id.* (quoting Joint Appendix at A134-35). The following day, the Third Circuit denied the publishers' petition for a writ of mandamus to compel reopening the hearings. *Id.* at 1063.

23. *Id.* The district court denied Cohen's motion on the ground that he lacked standing because he had retained no interest in Publicker after the court of common pleas invalidated his stock purchase agreement. *Id.* at 1063-64. For a discussion of Cohen's stock purchase plans, see *supra* note 12 and accompanying text. For a discussion of the sensitive information in question, see *supra* notes 14-15 and accompanying text.

mediate access to the transcript of the December 7 closed hearing.²⁴ Publicker responded with a motion to keep confidential the sensitive information that it had revealed in its memorandum of law and at the hearing.²⁵ On January 6, 1983, the district court granted Publicker's motion for confidentiality and directed Publicker to deliver to PNI and Dow Jones only the nonconfidential portions of the hearing transcript.²⁶ PNI and Dow Jones appealed to the Third Circuit, on both common law and first amendment grounds, from the district court's orders closing the hearing and sealing the transcript.²⁷ While the publishers' appeal was pending, Publicker moved to dismiss the appeal on grounds of mootness because confidentiality was no longer required.²⁸

The Third Circuit, with Judge Higginbotham writing for a unanimous panel,²⁹ rejected Publicker's mootness contention as a preliminary matter³⁰ and went on to address the merits of the case. The court stated

24. 733 F.2d at 1064. Dow Jones joined in PNI's motion the next day. *Id.*

25. *Id.* In opposition to the publishers' motion for immediate access to the hearing transcript, Publicker filed a memorandum of law which included a list of the nonconfidential portions of the transcript. *Id.* Publicker admitted that most of the transcript contained no confidential information, but despite the fact that Publicker had not sought to close the morning session, it claimed that portions of both the morning and afternoon transcripts should be kept confidential. *Id.* For a discussion of Publicker's requests for closure, see *supra* notes 17-22 and accompanying text.

26. 733 F.2d at 1064. Thus, the confidential information in the transcript remained under seal, and counsel for PNI and Dow Jones were ordered not to disclose to their clients the sensitive information which Publicker had disclosed in its memorandum of law. *Id.* The district court did not issue an opinion explaining this order. *Id.*

27. *Id.* PNI and Dow Jones claimed that the district court's December 7 order closing the hearing and January 6 order sealing the confidential portions of the transcript deprived them of their common law and first amendment rights of access to a civil trial and trial transcript without due process of law. *Id.*

28. *Id.* Publicker's motion was filed on November 17, 1983, more than two months after oral argument before the Third Circuit. *Id.* Publicker alleged in its motion that confidentiality was no longer necessary because Publicker had received the required approval for its subsidiary's use of the enzyme. *Id.* at 1064-65. Moreover, Publicker contended that it had already notified its stockholders of the sensitive information pursuant to a November 17, 1983 court order in a separate action, thereby making the instant appeal unnecessary. *Id.* at 1065 (citing *Publicker Indus., Inc. v. Clifford B. Cohn*, No. 83-1357, (E.D. Pa. Nov. 17, 1983)).

29. The case was heard by Circuit Judges Weis, Higginbotham, and Sloviter.

30. 733 F.2d at 1065-66. Publicker asserted that because it was the only party that requested confidentiality and because it no longer opposed the release of the information, there was no justiciable case or controversy before the court. *Id.* at 1065. Addressing this preliminary issue, the Third Circuit applied the test for mootness which the Supreme Court enunciated in *Southern Pacific Terminal Co. v. ICC*. *Id.* Under the *Southern Pacific* test, a case is not moot if the dispute is "capable of repetition, yet evading review." *Id.* (quoting *Southern Pacific*, 219 U.S. 498, 515 (1911)). This test includes two conditions: (1) the challenged action must be of such short duration that the litigation process cannot be completed while the dispute is still alive; and (2) there must be a reasonable

that under the common law the public and press have an indisputable right of access to judicial proceedings and judicial records.³¹ Acknowledging that the Supreme Court usually had considered the common law right of access to judicial proceedings and records only in connection with criminal trials,³² the Third Circuit examined the authority on which the Supreme Court had relied in those cases and held that the common law right of access extended to civil trials.³³ Recognizing the "impor-

possibility that the complaining party will again be subjected to the same action. *Id.* at 1065 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 377 (1979) (further citation omitted)). Addressing the first condition, the Third Circuit observed that the Supreme Court had recognized that criminal trials are generally of such short duration that closure orders in such trials usually "will evade review." *Id.* at 1066 (quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 563 (1980) (further citation omitted)). The Third Circuit reasoned that because hearings on the question of evidentiary confidentiality are of even shorter duration than criminal trials, closure orders in such hearings also will evade review. *Id.* As to the second condition, the Third Circuit reasoned that the exclusion of the press was reasonably certain to recur, and, therefore, it was likely that "newspaper publishers such as PNI and Dow Jones 'will be subject to similar closure orders entered by the district courts . . .'" *Id.* (quoting *United States v. Criden (Criden II)*, 675 F.2d 550, 554 (3d Cir. 1982), *noted in* the Third Circuit Review, 28 VILL. L. REV. 723 (1983)). Therefore, with both conditions of the test satisfied, the court denied Publicker's motion to dismiss the publishers' appeal because of mootness. *Id.*

31. 733 F.2d at 1066 (citing *United States v. Criden (Criden I)*, 648 F.2d 814, 819 (3d Cir. 1981)). In *Criden I*, television networks appealed from a district court order denying their application to copy for broadcast purposes video and audio tapes which were played to the jury during the criminal trial of two Philadelphia city council members. 648 F.2d at 815-17. The Third Circuit reversed and remanded, concluding that

the trial court accorded too little weight to the strong common law presumption of access and to the educational and informational benefit which the public would derive from broadcast of evidence introduced at a trial which raised significant issues of public interest [W]e believe that the application of the broadcasters should be granted, except for that material which the district court explicitly determines to be impermissibly injurious to third parties.

Id. at 829. In *Criden I*, the Third Circuit based part of its reasoning on Chief Justice Burger's discussion of the history of open criminal trials in *Richmond Newspapers*. *Id.* at 820-21 (citing *Richmond Newspapers*, 448 U.S. 555, 565-73 (1980)). Although the *Richmond Newspapers* decision was based on both common law and first amendment grounds, the *Criden I* court decided the case only on common law grounds. 648 F.2d at 820. For a discussion of *Richmond Newspapers*, see *supra* note 4, and accompanying text.

32. 733 F.2d at 1066 (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (murder trial); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (pre-trial suppression hearing in murder prosecution); *Nixon v. Warner Communications*, 435 U.S. 589 (1978) (criminal conspiracy trial); *In re Oliver*, 333 U.S. 257 (1948) (criminal contempt proceedings)).

33. *Id.* at 1066-67 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979)). The Third Circuit based its common law holding on the Supreme Court's review of the historical evidence presented in *Gannett* and on the Court's assessment that the long history of open judicial proceedings was not restricted to criminal cases. *Id.* The *Gannett* Court stated that

[i]f the existence of a common-law rule were the test for whether there

tance in guaranteeing [the] freedoms at issue," however, the court decided not to rest its decision on the common law right of access and went on to reach the constitutional issues.³⁴

The Third Circuit began its constitutional analysis by reviewing the Supreme Court's decisions in *Richmond Newspapers v. Virginia*³⁵ and *Globe Newspaper v. Superior Court*³⁶ to determine whether analogous reasoning would justify extending the first amendment protection to guarantee the public a right of access to civil proceedings.³⁷ In its examination of these decisions, the Third Circuit found that the Supreme Court's reasoning rested on two features of the criminal justice system: (1) an historical presumption of openness,³⁸ and (2) the significant role of the public's right of access in guarding the integrity and fairness of the judicial process.³⁹ The Third Circuit concluded that the same features of the criminal justice system were characteristic of the civil justice system.⁴⁰ As a basis for this conclusion, the court first found that the historical evidence revealed that civil proceedings had been presumptively open to the public, both in England and America.⁴¹ Second, the court

is a Sixth Amendment public right to a public trial, . . . there would be such a right in civil as well as criminal cases. . . . In short, there is no principled basis upon which a public right of access to judicial proceedings can be limited to criminal cases if the scope of the right is defined by the common law rather than the text and structure of the Constitution.

443 U.S. at 386 n.15.

34. 733 F.2d at 1067. For a discussion of the propriety of the courts' avoidance of constitutional issues, see *infra* note 70 and accompanying text.

35. 448 U.S. 555 (1980). For a discussion of *Richmond Newspapers*, see *supra* note 4 and accompanying text.

36. 457 U.S. 596 (1982). For a discussion of *Globe Newspaper*, see *supra* note 8 and accompanying text.

37. 733 F.2d at 1067-74. The Third Circuit recognized that these Supreme Court decisions guaranteed the public a right of access only to criminal trials. *Id.* at 1067-68 (quoting *Richmond Newspapers*, 448 U.S. at 580 n.17) (plurality opinion) ("[w]hether the public has a right to attend trials of civil cases is a question not raised by this case"); *Globe Newspaper*, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring) ("neither *Richmond Newspapers* nor the Court's decision today . . . carry any implications outside the context of criminal trials").

38. 733 F.2d at 1068 (quoting *Globe Newspaper*, 457 U.S. at 605). In *Globe Newspaper*, the Court explained that the historical presumption of openness was important "not only 'because the Constitution carries the gloss of history,' but also because 'a tradition of accessibility implies a favorable judgment of experiences.'" 457 U.S. at 605 (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring in judgment)).

39. 733 F.2d at 1068. The Third Circuit observed that in *Globe Newspaper* the Court emphasized that public access to criminal trials "enhances the quality and safeguards the integrity of the factfinding process . . . [a]nd . . . permits the public to participate in and serve as a check upon the judicial process." *Id.* (quoting *Globe Newspaper*, 457 U.S. at 606) (footnotes omitted by the court).

40. *Id.* at 1070.

41. *Id.* at 1068-70. The Third Circuit noted Sir Edward Coke's declaration that the Statute of Marlboro of 1267 required open judicial proceedings. *Id.* at 1068 (quoting 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 103 (6th ed.

reasoned that both the public and the judicial system benefited from the public's presence at civil trials.⁴² Therefore, the Third Circuit concluded that because the civil and criminal justice systems share these features, the first amendment protects the public's right of access to civil as well as to criminal proceedings.⁴³

Explaining its holding, the Third Circuit stated that although the public's right of access to civil proceedings is not absolute,⁴⁴ "nevertheless it is to be accorded the due process protection that other fundamental rights enjoy."⁴⁵ The court concluded that given such protection, the public's right of access to civil trials may be denied only if such a denial "serves an important governmental interest" and if "there is no less restrictive way to serve that governmental interest."⁴⁶

In clarifying this protection, the Third Circuit specified that a party seeking closure must meet the burden of proving that there is good

1681)). The Third Circuit cited Sir Matthew Hale, Williams Blackstone, and Professor John Henry Wigmore for the proposition that one reason for open trials, both civil and criminal, is to encourage truthful testimony. *Id.* at 1068-70 (citing 3 W. BLACKSTONE, COMMENTARIES 373 (W. Lewis ed. 1898); M. HALE, HISTORY OF THE COMMON LAW OF ENGLAND 163 (C. Gray ed. 1971); 6 J. WIGMORE, EVIDENCE § 1834, at 435 (J. Chadbourn rev. 1976)).

42. *Id.* at 1069-70. In part, the Third Circuit relied on Oliver Wendell Holmes' statement that

[i]t is desirable that the trial of [civil] causes should take place under the public eye . . . not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Id. at 1069 (quoting Cowley v. Pulsifer, 137 Mass. 392, 394 (1884)). The court also looked to Professor Wigmore as authority for the proposition that public access to judicial trials benefits the public in two ways: (1) by ensuring that officers of the court perform conscientiously, and (2) by increasing public knowledge and respect for the judicial system and judicial remedies. *Id.* at 1069-70 (citing 6 J. WIGMORE, EVIDENCE § 1834, at 438 (J. Chadbourn rev. 1976)).

43. *Id.* at 1070.

44. *Id.* (citing *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 581 n.18 (plurality opinion) (further citations omitted)).

45. *Id.* at 1070 (citing *Globe Newspaper*, 457 U.S. at 606-07 (further citations omitted)). In articulating the standard of review for limitation of the public's right of access to a criminal proceeding, the *Globe Newspaper* Court stated that "[w]here . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." 457 U.S. at 606-07 (emphasis added).

46. 733 F.2d at 1070 (citing *Globe Newspaper*, 457 U.S. at 606-07) (further citation omitted)). Although the Third Circuit required an important government interest, rather than a compelling one, it is submitted that the Third Circuit's standard of review is the same as the *Globe Newspaper* standard because both require the least restrictive means. For a discussion of the *Globe Newspaper* standard, see *supra* note 45 and accompanying text. For a general discussion of *Globe Newspaper*, see *supra* note 8 and accompanying text.

cause for the court to provide such protection.⁴⁷ The court then specified the procedural and substantive requirements that a trial court must satisfy before it can deny the public's right of access to civil proceedings: procedurally, the court must articulate the countervailing interest it seeks to protect with sufficient specificity to permit judicial review;⁴⁸ substantively, the court must demonstrate "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."⁴⁹

47. 733 F.2d at 1070-71. Judge Higginbotham explained that the party seeking closure of a hearing or sealing of a transcript bears the burden of showing that the material in question is the kind of information that courts will protect and that good cause exists for the closure order. *Id.* (citing *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 890 (E.D. Pa. 1981)). Good cause, according to the court, is established by a showing that a "clearly defined and serious" injury will result from disclosure. *Id.* at 1070 (citing *Zenith Radio Corp.*, 529 F. Supp. at 891). For a discussion of the kind of interests the court will protect, see *infra* notes 49 & 60 and accompanying text.

48. 733 F.2d at 1071 (citing *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819, 824 (1984) (demanding more specificity than the assertion of the defendant's general right to a fair trial or the prospective jurors' rights to privacy to justify closure of extensive voir dire proceedings); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 663-64 (8th Cir. 1983) (finding sufficient specificity to justify sealing portions of transcript in testimony that manufacturer's property rights in trade secrets would be damaged by disclosure of marketing and distribution plans contained in exhibits)).

49. *Id.* at 1073 (quoting *United States v. Criden* (*Criden I*), 648 F.2d 814, 824 (3d Cir. 1981)). The court explained that the overriding interest required for closure can involve "the content of the information at issue, the relationship of the parties, or the nature of the controversy." *Id.* More specifically, the court explained that safeguarding the contents of a trade secret or the existence of an attorney-client relationship could be the basis of finding an overriding interest. *Id.* (citing *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 890 (E.D. Pa. 1981) (trade secret); *E.I. Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917) (attorney-client relationship)). The court also explained that an overriding interest could be established where disclosure of the nature of the controversy would deprive a party of his right to enforce a contractual obligation not to disclose specific information. *Id.* at 1073-74.

Unless there is such an overriding interest, the Third Circuit stated that there is a presumption that civil proceedings will be open. *Id.* at 1073 (citing *Criden I*, 648 F.2d at 824). The court indicated that, where a party seeks closure, the trial court may consider the allegedly confidential matter in camera and, later, make the transcript available to the public if the countervailing interests are deemed insufficient to overcome the presumption of openness. *Id.* at 1072. The court emphasized, however, that the availability of the transcript is not an "adequate substitute" for a public presence at the trial. *Id.* (quoting *In re Iowa Freedom of Information Council*, 724 F.2d 658, 663 (8th Cir. 1983)). Therefore, the court warned that in deciding whether to conduct a proceeding in camera, the trial court cannot relax the standards necessary to close proceedings simply because the transcript can be made available later. *Id.* at 1072. Finally, the Third Circuit advised that if a trial court finds an overriding interest which requires confidentiality, it may close a hearing or seal a transcript as long as the court uses the least restrictive means of maintaining the required confidentiality. *Id.* at 1071 (quoting *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819, 824 (1984)).

The Third Circuit proceeded to examine the record in this case to determine whether the trial court had abused its discretion by closing the December 7 hearing and sealing portions of the transcript.⁵⁰ First, the court addressed the procedural requirements.⁵¹ Regarding Cohen's motion to force Publiker to disclose its "sensitive" information, the court stated that the district court had adequately articulated the countervailing interest it sought to protect by closing the hearing.⁵² Regarding Publiker's motion to enjoin Cohen from soliciting and voting proxies, however, the Third Circuit found that the district court had abused its discretion by failing to articulate any countervailing interest that would be protected by the closure.⁵³ Further, the Third Circuit found that the district court failed to meet the procedural requirements when it ordered the confidential portions of the transcript to be sealed without articulating any countervailing interest to explain its order.⁵⁴

Finally, the appellate court addressed the question of whether the trial court had met the substantive requirements for denying the public's right of access to the hearing and the transcript.⁵⁵ The Third Circuit stated that the district court had not met the substantive requirements

50. *Id.* at 1071. For a discussion of the issues before the court at this hearing, see *supra* note 16 and accompanying text.

51. For a discussion of the procedural requirements, see *supra* note 48 and accompanying text.

52. 733 F.2d at 1071. The Third Circuit found that the district court had clearly articulated the countervailing interest when it stated that "[i]f I were to permit the newspapers in here you would be usurping my function in deciding the case before I did by revealing the information, even though I [might] ultimately decide that it shouldn't be revealed." *Id.* at 1071 (quoting Joint Appendix at A134-35). For a further discussion of the district court's explanation for denying public access to the hearing, see *supra* note 21 and accompanying text.

53. 733 F.2d at 1072.

54. *Id.* at 1072-73. Because of the lack of a record on the question, the Third Circuit was forced to "indulge in speculation" to determine the reasons behind the district court's decision. *Id.* at 1072. The Third Circuit suggested that the district court may have ordered portions of the transcripts sealed in order to preserve its ability to decide the issue of confidentiality. *Id.* at 1073. The appellate court intimated that if the district court had not yet decided the issue of confidentiality before issuing the order to seal the transcript, then the order would have been proper "as [a] mechanism[] with which to buttress the district court's attempt to preserve secrecy while it deliberated on the question of confidentiality." *Id.* Alternatively, the Third Circuit hypothesized that the order sealing portions of the transcript may have constituted the district court's decision on the merits of the confidentiality question. *Id.* If that hypothesis was true, the Third Circuit stated, then the district court could no longer rely on the previously stated rationale of preserving its ability to determine the issue of confidentiality as a reason for sealing the transcript. *Id.* The Third Circuit explained that under the first rationale the sealing order would have been valid, whereas under the second hypothesis the order would have been invalid. *Id.* Since the appellate court was left to speculate on the district court's rationale, the Third Circuit concluded that the procedural requirement was not met. *Id.* (quoting *United States v. Criden* (*Criden I*), 648 F.2d 814, 819 (3d Cir. 1981)).

55. *Id.* at 1073-74. For a discussion of the substantive requirements for limiting the public's right of access, see *supra* note 48 and accompanying text.

because it (1) failed to demonstrate any overriding interest that required denying public access to the hearing on Publicker's motion,⁵⁶ (2) failed to restrict the closed portion of the hearing as narrowly as possible,⁵⁷ and (3) failed to show that sealing the transcript was essential to protect Publicker's interest and was the least restrictive means of keeping the information confidential.⁵⁸ The Third Circuit indicated that the "sensitive" information in this case⁵⁹ was not the kind of commercial information that the courts have traditionally protected⁶⁰ and that, in the absence of other considerations,⁶¹ courts should not deny the public's

56. 733 F.2d at 1074. The Third Circuit had already found that the district court failed to meet even the procedural requirement of articulating an interest which it sought to protect in closing the hearing on Publicker's motion. *See supra* note 53 and accompanying text. Moreover, the appellate court indicated that it could not think of any interest that would justify closure of the hearing on Publicker's motion. 733 F.2d at 1074. The Third Circuit intimated that the district court should have indicated why it did not consider a less restrictive alternative to closure of the hearing on Cohen's and Publicker's motions, such as a bifurcated hearing. *Id.* Since neither the procedural nor the substantive requirements were met with regard to the closure of the hearing on Publicker's motion, the Third Circuit found that the district court abused its discretion by excluding the public from this aspect of the hearing. *Id.* For a discussion of the issues raised in Publicker's motion and the circumstances of the hearing on this motion, see *supra* notes 11-12 & 15 and accompanying text.

57. 733 F.2d at 1074. The court stated that the district court's closure of the hearing on both Cohen's and Publicker's motions extended too far because confidentiality was a concern only with regard to Cohen's motion. *Id.* Because the district court heard both motions in the same closed session, the appellate court concluded that the "hearing was not 'narrowly tailored' " to serve the interest in confidentiality which the court articulated regarding Cohen's motion. *Id.* (quoting *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819, 824 (1984)). The Third Circuit implied that a bifurcated hearing would have been acceptable as a less restrictive alternative to closure on Publicker's motion. *Id.* For a discussion of the issues before the court at the closed hearing, see *supra* notes 13-14 & 16 and accompanying text.

58. 733 F.2d at 1074. The Third Circuit noted that since the district court had failed to articulate any countervailing interest it sought to protect in sealing the transcript, it was not necessary for the appellate court to reach the question of substantive requirements. *Id.* Nevertheless, the court addressed the substantive requirements. *See supra* note 55 and accompanying text.

59. For a discussion of the sensitive information in question, see *supra* notes 14-15 and accompanying text.

60. 733 F.2d at 1074 (citing *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 890 n.42 (E.D. Pa. 1981)). Historically, the courts have protected a variety of interests, including children's testimony involving decency or morality, secret trade processes, and testimony which would threaten national safety. *See E. JENKS, supra* note 1, at 92. More recently, courts have protected a wider range of business interests. *See, e.g., Chesa Int'l, Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234 (S.D.N.Y.), *aff'd mem.*, 573 F.2d 1288 (2d Cir. 1977) (customer list); *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975) (financial records detailing capitalization, net worth, and annual income); *Maritime Cinema Serv. Corp. v. Movies En Route, Inc.*, 60 F.R.D. 587 (S.D.N.Y. 1973) (license fees and oral contracts with customers). For a further discussion of the interests which courts have protected, see *supra* note 49 and accompanying text.

61. 733 F.2d at 1074. The court stated that an enforceable confidentiality

access to trial evidence concerning a company's poor management practices.⁶²

In analyzing the *Publicker Industries* opinion, it is submitted that the Third Circuit took a bold step in extending first amendment protection to the public's right of access to civil proceedings.⁶³ Although the Supreme Court had foreshadowed the extension of this protection to civil as well as criminal proceedings,⁶⁴ it is submitted that common law

agreement constitutes the type of "other consideration" that would justify denying the public's right of access to trial evidence. *Id.*

62. *Id.* The court stated that "[t]he presumption of openness plus the policy interest in protecting unsuspecting people from investing in Publicker in light of its bad business practices are not overcome by the proprietary interest of present stockholders in not losing stock value or the interest of upper-level management in escaping embarrassment." *Id.*

In conclusion, the Third Circuit acknowledged that the trial judge has a difficult task when making closure decisions because of the time pressures of a trial court. *Id.* Further, the court recognized that in this case it had not only the advantage of time to review the closure decision but also the benefit of guidance from the Supreme Court which was unavailable when the district court ruled on the confidentiality issues. *Id.* Apparently, the Third Circuit was referring to the guidance it received regarding the procedural and substantive requirements of closure from *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819, 824 (1984). Because of the additional guidance available to the appellate court from the *Press-Enterprise* opinion, the Third Circuit stated that "we regard this opinion as announcing what we believe the law to be rather than a critique on the trial judge's performance." *Id.* at 1075. For a discussion of the procedural and substantive requirements which were defined in *Press-Enterprise*, see *supra* notes 49-50 and accompanying text.

63. For a discussion of the Third Circuit's holding that the first amendment protects the public's right of access to civil proceedings, see *supra* notes 35-43 and accompanying text.

64. See *Richmond Newspapers*, 448 U.S. at 580 n.17 (plurality opinion) ("[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open"); *id.* at 599 (Stewart, J., concurring) ("the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal").

Moreover, commentators had predicted that the courts would extend the public's first amendment right of access to civil trials. See, e.g., Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 430 (1981) ("*Richmond Newspapers* supports the conclusion that the right of access surely applies to civil trials"); Note, *The First Amendment Right of Access to Government-Held Information: A Re-Evaluation After Richmond Newspapers, Inc. v. Virginia*, 34 RUTGERS L. REV. 292, 328 (1982) ("[a]lthough *Richmond's* express holding finds only a first amendment right to attend criminal trials, there is no apparent obstacle to extending first amendment access rights to civil trials as well"); Note, *Constitutional Law—First Amendment—The Public and Press Have a Right of Access to Criminal Trials Absent an Overriding Interest Articulated in Findings*, 26 VILL. L. REV. 183, 202 (1980) ("Whether the right of the public to attend trials identified in [*Richmond Newspapers*] . . . applies to civil, as well as criminal, trials is left unanswered. . . . [But i]n all probability it does.").

Publicker Industries was not the first extension of *Richmond Newspapers* beyond the limited context of criminal trials. See, e.g., *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1983) (extending to the public a first amendment right of access to proceedings for contempt, a hybrid containing both civil

grounds were sufficient to decide *Publicker Industries*.⁶⁵ In both *Richmond Newspapers*⁶⁶ and *Globe Newspaper*,⁶⁷ a state statute had been challenged as unconstitutional,⁶⁸ making it necessary for the Supreme Court to reach the first amendment issue.⁶⁹ In contrast, nothing in *Publicker Industries* made it necessary for the Court to reach the constitutional issue.⁷⁰

and criminal characteristics); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (guaranteeing the public a first amendment right of access to civil trials which pertain to the release or incarceration of prisoners and to the conditions of their confinement); *United States v. Criden (Criden II)*, 675 F.2d 550 (3d Cir. 1982) (guaranteeing the public a first amendment right of access to pretrial suppression, due process, and entrapment hearings in criminal prosecution); *In re United States ex rel. Pulitzer Publishing Co.*, 635 F.2d 676 (8th Cir. 1980) (guaranteeing the public a right of access to criminal voir dire proceedings); *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) (recognizing a first amendment right of access to pretrial detention hearings), *cert. denied*, 455 U.S. 1022 (1982). *But see* *Tavoulareas v. Washington Post*, 724 F.2d 1010 (D.C. Cir. 1984) (denying a first amendment right of access to pretrial deposition transcripts not used at trial); *In re San Juan Star*, 662 F.2d 108 (1st Cir. 1981) (denying a first amendment right of access to information obtained in discovery).

65. For a discussion of the court's holding that the publishers had a common law right of access to civil trials, see *supra* notes 31-34 and accompanying text.

66. For a discussion of *Richmond Newspapers*, see *supra* notes 4 & 7 and accompanying text.

67. For a discussion of *Globe Newspapers*, see *supra* note 8 and accompanying text.

68. *Globe Newspaper*, 457 U.S. at 603-06 (challenge to state statute mandating exclusion of press and public during testimony of minor victims of sexual offenses); *Richmond Newspapers*, 448 U.S. at 560 (challenge to state statute granting court discretionary power to exclude persons from trial).

69. See *Richmond Newspapers*, 448 U.S. at 605 (Rehnquist, J., dissenting) ("our authority to reverse a decision by the highest court of the State is limited to only those occasions when the state decision violates some provision of the United States Constitution").

In cases like *Publicker Industries*, where nonconstitutional grounds are available to decide a case, the federal courts have traditionally sought to avoid constitutional issues. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("[t]he Court [has] developed . . . a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision"). The Supreme Court has explained its policy of avoiding the adjudication of constitutional questions by stating that this policy has

involved a continuous choice between the obvious advantages it produces for the functioning of government in all its coordinate parts and the very real disadvantages, for the assurance of rights, which deferring decision very often entails. On the other hand it is not altogether speculative that a contrary policy, of accelerated decision, might do equal or greater harm for the security of private rights, without attaining any of the benefits of tolerance and harmony for the functioning of the various authorities in our scheme. For premature and relatively abstract decision, which such a policy would be most likely to promote, have their part too in rendering rights uncertain and insecure.

Rescue Army v. Municipal Court, 331 U.S. 549, 571-72 (1947).

70. 733 F.2d at 1067. The Third Circuit acknowledged that *Publicker Indus-*

Nevertheless, after deciding that the public's right of access was sufficiently important to warrant constitutional protection,⁷¹ the Third Circuit carefully applied the first amendment analysis which the Supreme Court first announced in the *Richmond Newspapers*⁷² plurality opinion and later clarified in *Globe Newspaper*.⁷³ In its application of this line of analysis, the Third Circuit is to be commended for its specificity in articulating the procedural and substantive requirements which a trial court must meet to justify limitation of the public's right.⁷⁴ The Third Cir-

tries could have been decided on common law grounds alone. *Id.* For a discussion of the court's common law holding, see *supra* notes 33-34 and accompanying text. It is noteworthy that the Third Circuit had previously based a decision that the press had a right of access to video and audio tapes from a criminal trial solely on common law grounds. See *United States v. Criden (Criden I)*, 648 F.2d 814, 819 (3d Cir. 1981). For a discussion of *Criden I*, see *supra* note 31 and accompanying text.

71. For a discussion of the Third Circuit's decision to address the constitutional issues, see *supra* note 34 and accompanying text.

72. For a discussion of *Richmond Newspapers*, see *supra* notes 3 & 6 and accompanying text. The basis for the first amendment protection guaranteed in *Richmond Newspapers*, and followed by the Third Circuit, was the historical presumption of open judicial proceedings. *Richmond Newspapers*, 448 U.S. at 564-73 (plurality opinion). This presumption convinced the Supreme Court that the first amendment contained a guarantee that the public could assemble to listen and observe what goes on in public places, such as courtrooms in order to protect "freedom of communication on matters relating to the functioning of government." *Id.* at 575 (plurality opinion). See generally Fenner & Koley, *supra* note 64, at 420-30 (comparing the seven opinions in *Richmond Newspapers*).

73. For a discussion of *Globe Newspapers*, see *supra* note 8 and accompanying text. In *Globe Newspaper*, a five-Justice majority agreed that the first amendment protects the public's right of access to criminal trials to ensure that the constitutionally protected "discussion of governmental affairs" is an informed one. 457 U.S. at 604-05. As in *Richmond Newspapers*, the *Globe Newspaper* Court emphasized the importance of the long history of open judicial proceedings in interpreting the first amendment protection. *Id.* For a discussion of the Third Circuit's application of this line of reasoning, see *supra* notes 38-43 and accompanying text.

74. For a discussion of these requirements, see *supra* notes 48-49 and accompanying text. In comparison to the Third Circuit's specificity in describing the requirements for denying the public's right, the *Richmond Newspapers* Court provided little guidance for trial courts that are facing closure decisions. The *Richmond Newspapers* plurality implied that the articulation of an "overriding interest" in the findings might justify closure without clarifying what would constitute such an overriding interest. 448 U.S. at 581 (plurality opinion). See also Note, *Richmond Newspapers, Inc. v. Virginia: A New But Uncertain "Right of Access,"* 32 SYRACUSE L. REV. 989, 1019 (1981) ("[u]ntil the Court adopts a specific standard of closure, trial courts must rely upon some general guidelines set forth in *Richmond*").

In subsequent extensions of *Richmond Newspapers* and *Globe Newspaper*, the courts have clarified the requirements for closure in a range of judicial proceedings. See, e.g., *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819, 824 (1984) (general assertion of defendant's fair trial rights and potential jurors' privacy rights found not sufficiently specific to justify closure of *voir dire* examinations prior to criminal trial); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 662 (8th Cir. 1983) (counsel's representation that trade secrets were involved found sufficient to justify closure to consider issue of confidentiality).

cuit's explication of these requirements will force trial courts to make their closure decisions a matter of record for the purposes of public inspection and appellate review.⁷⁵ In cases where the requirements for closure are not met, the only proceeding to which the public will be denied access is the hearing on the issue of confidentiality, which subsequently will be available to the public through the transcript.⁷⁶

Although the Third Circuit carefully specified the requirements for closure, it is submitted that the *Publicker Industries* facts did not require full application of the substantive requirements.⁷⁷ The only countervailing interest articulated by the trial court was Publicker's interest in maintaining the confidentiality of its subsidiary's improper business practice.⁷⁸ The Third Circuit stated, however, that the courts would not protect a poor business practice of this type.⁷⁹ As a result, when addressing the substantive requirements, the court could only balance the public's right of access against Publicker's asserted right, which was completely unprotected.⁸⁰ Because there was no protectable interest to balance against the public's right of access, it is suggested that *Publicker Industries* makes the public's right of access appear stronger than subsequent courts will find it. For example, it is submitted that if the public's right is weighed against a colorable claim for protection of a trade secret or of a minor's right to privacy, the public's right would be outweighed.⁸¹ It remains for future cases to define the relative weight of

where court knew details of trade secret involvement); *United States v. Criden (Criden II)*, 675 F.2d 550 (3d Cir. 1982) (posting of closure motions on docket, consideration of alternatives to closure, and articulation of reasons for closure required to justify closing pretrial suppression, due process and entrapment hearings).

75. For a discussion of the procedural and substantive requirements, see *supra* notes 48-49 and accompanying text.

76. For a discussion of the required procedures for closure as applied to the *Publicker Industries* facts, see *supra* notes 52-62 and accompanying text.

77. For a discussion of the court's application of the substantive requirements to the *Publicker Industries* facts, see *supra* notes 55-62 and accompanying text.

78. For a discussion of the court's determination that the trial court had articulated a countervailing interest only with regard to protecting Publicker's "sensitive" information, see *supra* notes 52-56 and accompanying text.

79. For a discussion of the court's reasoning as to why Publicker's "sensitive" information should not be protected, see *supra* notes 59-62 and accompanying text. For a discussion of the types of interests the courts will protect, see *supra* notes 49 & 60 and accompanying text.

80. 733 F.2d at 1074. For a discussion of the substantive requirements describing the required balancing of the public's right of access against the state's or moving party's interest in maintaining confidentiality, see *supra* note 49 and accompanying text.

81. See, e.g., *Globe Newspaper*, 457 U.S. at 607-08. In *Globe Newspaper*, the Court indicated that where a court made specific findings to support a limited closure decision, the state's interest in protecting the physical and psychological well-being of a minor could be strong enough to outweigh the public's right of access during the minor's testimony. *Id.* In such a case, it is submitted that the

the public's right of access with respect to the various interests that the courts will protect.⁸²

As a result of the *Publicker Industries* decision, the news media may exercise their right of access to civil proceedings with increased frequency.⁸³ Because the Third Circuit's requirements for closure are strict, the press and public will gain increased access to information.⁸⁴ It is submitted that in extending the protective umbrella of the first amendment to guarantee the public a right of access to civil proceedings, the Third Circuit has taken a significant step in the direction of expanding the protection given to informed public debate under the first amendment.⁸⁵

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public's right of access would, by comparison, appear less weighty than it does in *Publicker Industries*. For a discussion of the types of interests which the courts are willing to protect, see *supra* notes 49 & 60 and accompanying text.

82. For a discussion of the substantive requirements which specify that the public's right of access will be presumed and then balanced against an asserted protectable interest, see *supra* note 49 and accompanying text.

83. It is submitted that with an established right of access to judicial proceedings, publishers and reporters may be increasingly willing to assert this right in order to gain access in cases in which the right would not previously have appeared to be worth litigating.

84. For a discussion of the requirements for closure, see *supra* notes 48-49 and accompanying text.

85. See *Richmond Newspapers*, 448 U.S. at 587-88 (Brennan, J., concurring in judgment) (citing *New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964) ("debate on public issues should be uninhibited, robust, and wide-open")).